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MAY 5 2005

No. 04-1351

In The

Supreme Court of the United States

Sean Bernat, et. al.,

Petitioners,

v.

The Honorable Michael G. Allphin, et. al.,

Utah Respondents.

On Petition For Writ of Certiorari
To The Utah Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Double Jeopardy Clause of the United States Constitution require Utah to automatically vacate a conviction from a trial court when it provides appellate review through a trial de novo standard?

II. Does the Due Process Clause of the United States Constitution prohibit Utah from requiring a defendant to request and obtain a certificate of probable cause in order to gain release pending trial de novo appellate review?

III. Does the Equal Protection Clause of the United States Constitution require the state to treat convicted justice court defendants the same as district court defendants who have successfully appealed their conviction and are facing a retrial, rather than placing justice court defendants in the same position as district court defendants who are appealing their conviction?

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RESPONDENTS RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

The Respondents generally accept the Petitioners' statement of the case insofar as it correctly recites the procedural history of this matter. The Respondents object, however, to some of the characterizations of the court rules and some of the procedures. Much of this will be discussed in the first section of the argument. The Petitioners have otherwise included argument in their statement of the case and they have failed to include relevant portions of the Utah Supreme Court's decision in which the Utah court discussed and denied the Petitioners' claims. The Respondents believe that they are not required to cure Petitioners' deficiencies by providing a complete and correct statement of the case.

ARGUMENT

1. Brief Review of Utah's Trial and Appellate Court Scheme.

A review of the justice systems in the fifty states would most likely reveal differences between all of the states. Each state is entitled to create its own justice system, provided the systems comply with constitutional principles. In determining whether to accept this case, it is important to recognize that each state is different and it will be helpful to understand the trial and appellate court scheme that Utah has established.

In Utah, criminal cases are prosecuted in either a district court or a justice court. District courts are constitutional courts of general jurisdiction, but on the criminal side, the district courts primarily handle felonies and class "A" misdemeanors. See Article VIII, Section 5 of the Utah Constitution. (The Utah laws cited in this response are found in the Appendix, in the order referenced in the brief). Justice courts are statutory courts of limited jurisdiction and handle class "B" and "C" misdemeanors, and infractions. See Utah Code Ann. § 78-5-104. The district court is a court of record and the judges must have law degrees. The justice courts are courts not of record and the judges are not required to have law degrees. See Article VIII, Section 11 of the Utah Constitution.

Justice court criminal proceedings are generally handled the same as district court proceedings. The Utah Supreme Court's Rules of Criminal Procedure apply in both courts. Justice court defendants are entitled to constitutional and statutory protections such as the right to counsel and the right to a jury trial under the same circumstances as in the

district courts. The primary differences between the two courts are that the justice courts are courts not of record and some of the judges do not have juris doctorate degrees. Otherwise, the courts and proceedings are similar.

A defendant convicted in a district court has a right to appeal the conviction to either the Utah Court of Appeals or the Utah Supreme Court, depending on the type of case. A district court defendant who wishes to obtain a stay of the conviction pending appeal may seek a certificate of probable cause under Rule 27 of the Utah Rules of Criminal Procedure. A certificate of probable cause is sought first from the district court and then from the appellate court if the district court request is denied.

A defendant convicted in a justice court is entitled to appeal the conviction to the district court. Because the justice court is a court not of record, the district court's review of the case is a trial de novo. See Utah Code Ann. § 78-5-120. The Utah statutes and rules do not provide that a justice court judgment is automatically vacated upon the filing of a notice of appeal. However, similar to a district court defendant, a justice court defendant may seek a certificate of probable cause to obtain a stay of the justice court sentence pending the trial de novo appellate review. See Rule 38, Utah Rules of Criminal Procedure (formerly Rule 4-608 of the Utah Code of Judicial Administration). The certificate is sought first from the justice court and then from the district court, if denied by the justice court. The granting or denying of the certificate of probable cause is not a condition of being able to appeal the judgment, nor does that decision relate in any way to the subsequent proceedings. At the criminal trial, the prosecutor still has the burden of proof, and the defendant retains all trial court rights, such as counsel, jury and evidentiary rules.

The Utah Supreme Court has determined that the district court proceedings satisfy a defendant's right to appeal. In Monticello v. Christensen, 788 P.2d 513, 516 (Utah 1990) the court stated that "in Utah, at least, it is settled that the right to an 'appeal' from a court not of record is satisfied by provision for a trial de novo in a court of record." The district court trial de novo proceedings constitute an appeal for all practical purposes. According to Utah Code Ann. § 78-5-120(7) "the decision of the district court is final and may not be appealed unless the district rules on the constitutionality of a statute or ordinance." As a true appeal, the Utah Supreme Court has stated that a district court may not impose a sentence harsher than that imposed by the justice court. In Wisden v. District Court of Sevier County, 694 P.2d 605, 606 (Utah 1984), the court stated that "a person's decision to avail himself of the right to appeal . . . may not be impaired by making it conditional on taking the risk of a harsher sentence." The Utah system has thus strived to protect the rights of defendants by providing constitutional and statutory rights at all levels and preserving a true right to appeal.

2. The questions presented for review do not raise an important federal question that must be decided by this Court.

In their petition, the Petitioners have argued that United States Supreme Court precedent requires a state to automatically vacate a judgment from the first tier of a two-tier system,[1] while also arguing that the questions presented

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[1]If this Court accepts this case, it may be helpful to discuss and define the concept of a "two-tier system." Given the wide variety of state systems, the term may actually be of

by this case have never been decided by this Court and therefore must be decided by this Court. The Respondents do not believe that either assertion is correct.

Throughout the state court proceedings, the Petitioners have relied unsuccessfully on several United States Supreme Court cases for the proposition that a state must create a completely clean slate when providing trial de novo, appellate review. As the Utah Supreme Court determined (and the Utah trial courts and the Utah Court of Appeals before it), this court has never declared that such a completely clean slate is constitutionality required. In Colten v. Kentucky, 407 U.S. 104 (1972), the issue was whether a defendant could be subject to a harsher penalty upon exercising the statutory right to a trial de novo in a court of general jurisdiction. The defendant in that case had relied on North Carolina v. Pearce, 395 U.S. 711 (1969). This Court determined that a trial de novo defendant could be subject to a greater penalty in the second proceeding.[2] The question of whether a completely clean slate is required under the Constitution was not addressed by the court. It was simply a fact that the state of Kentucky already provided an arguably clean slate.

One of the issues in Ludwig v. Massachusetts, 427 U.S. 618 (1996) was whether the Double Jeopardy Clause was violated when the state of Massachusetts conducted two separate trials in its two-tier system. In the Massachusetts

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little use in defining some of these systems.

[2]As noted above, the Utah Supreme Court has determined that justice court defendants may not receive a greater penalty on appeal.

system, the right to a jury trial was not afforded in the first court, but was offered on trial de novo. This Court rejected the defendant's argument as being "without substance." Id. at 631. The Court stated that "nothing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal." Id. at 632.

In Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984), another challenge was presented to the Massachusetts trial de novo system. In Lydon, the defendant was convicted in a lower court on evidence that all sides seemed to admit was inadequate. Id. at 297. The defendant subsequently claimed that, because there was insufficient evidence to convict him at the first trial, the second, de novo proceeding violated double jeopardy. Id. at 298. This Court held that double jeopardy was not violated.

The important principle from all of these cases is that this Court has upheld the constitutionality of each of the state schemes that it has reviewed. In reviewing the schemes and the questions presented, this Court has never declared that a state must vacate a conviction prior to proceeding with a trial de novo appeal. This fact supports the Respondents' argument that this Court should not accept this case.

In addition to misunderstanding the United States Supreme Court's decisions on trial de novo systems, the Petitioners' argument misunderstands the concept of double jeopardy. The Double Jeopardy Clause protects a defendant against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. Department of Revenue v. Kurth Ranch, 511 U.S. 767, 769, n.1 (1994). In analyzing double jeopardy claims there are

two primary inquiries. The first is whether jeopardy has attached and the second is whether the jeopardy has released or become complete such that prosecution is barred.

When a Utah justice court defendant is in the position to seek a trial de novo appeal, there is little question that jeopardy has attached in the first proceeding. In jury trials, jeopardy attaches after a jury has been selected and sworn. Illinois v. Somerville, 410 U.S. 458, 466 (1973). In bench trials, jeopardy attaches after the first witness is sworn and the court begins to hear evidence. Crist v. Bretz, 437 U.S. 28, 37, n. 15 (1978). Utah treats the jeopardy as being inextricably attached through the justice court proceeding and the subsequent trial de novo appeal. This position is constitutionally sound. The Petitioners are asking for a directive requiring Utah to nullify the jeopardy that has attached at the justice court. This request is constitutionally infirm. There is nothing in the Double Jeopardy Clause and its attendant protections that would require a state to vacate jeopardy that has previously attached. The Utah Supreme Court wisely recognized this principle.

The problem with the Petitioners' request and analysis is that they equate jeopardy with a conviction. The Petitioners suggest that the only way the state may proceed with a trial de novo is if the conviction is vacated, which the Petitioners argue would thereby vacate and nullify the jeopardy that has attached. This argument misunderstands double jeopardy. This position is beyond any position that has previously been taken by this Court and is not constitutionally required. Review by this Court is therefore not warranted.

3. The Utah Supreme Court's decision does not conflict with other state decisions.

As has previously been noted, an analysis of each state would potentially show fifty different justice systems. The Petitioners claim that the Utah Supreme Court's decision conflicts with other state decisions. The Petitioners have cited several of those cases. However, a review of those decisions will show that none of these states have declared that the United States Constitution requires a state to automatically vacate a conviction when a defendant is provided a trial de novo appeal. Some states have determined that their state statutes require the conviction to be automatically vacated. See e.g. City of Salina, Kansas v. Amador, 85 P.3d 724 (Kan. App. 2004); New Hampshire v. Guy, 667 A.2d 1026 (N.H. 1995); and Clark v. City of Mobile, 357 So.2d 675 (Ala. App. 1978). However, those decisions are based on state statutes and rules and not on the United States Constitution.[3]

The Utah Supreme Court's decision is consistent with its prior treatment of justice court appeals. The decision is consistent with Utah state statutes which treat justice court convictions as final for such purposes as reporting to the drivers license division, even pending an appeal. See Utah Code Ann. § 53-3-218. The decision is also consistent with this Court's decisions and is not in conflict with any other state decisions.

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[3]In the Respondents' opinion, if a federal problem exists, it lies with those states who choose to nullify the jeopardy that has attached. This approach seems more problematic than Utah's approach of affirming jeopardy.

4. The Petitioners have misrepresented the facts related to the due process claims.

The Petitioners have presented two due process arguments. The Petitioners claim that the Utah scheme discourages and burdens the right to appeal and shifts the burden to the accused. The Petitioners' claims are a misrepresentation of Utah law.

As noted in the above sections, the Utah statutes and rules provide a defendant with an opportunity to obtain a stay of a conviction pending appeal. The certificate is not a condition precedent to appeal. The appeal will proceed with or without a certificate. The opportunity for justice court defendants is the same opportunity provided to defendants in the district courts. The certificate is an opportunity to gain release pending appeal. The procedure promotes due process by giving defendants this opportunity. The Petitioners have alleged that the procedure creates potential problems because a defendant may serve a sentence before an appeal is resolved. However, none of the Petitioners have actually faced these circumstances, or been denied a certificate of probable cause. Furthermore, the risk is the same as that faced by other convicted defendants and therefore does not violate due process. The established system has worked for Utah's justice court defendants and review by this Court is not necessary.

5. The Utah scheme does not violate the equal protection clause.

The Petitioners claim that the Equal Protection Clause requires Utah to treat justice court defendants the same as defendants who have successfully appealed and are receiving a retrial. The Utah Supreme Court interpreted the Utah

scheme as placing justice court defendants in the same footing as district court defendants appealing their convictions. This decision is sound and does not require additional review.

The United States Supreme Court has never held that a defendant similar to a justice court defendant must be treated similarly to those in the position of receiving a retrial. The circumstances under which this concept has been mentioned is in the Court's double jeopardy cases. This Court has stated that the reason a defendant subject to a de novo trial is not subject to double jeopardy is similar to the reason that a defendant who successfully appeals a conviction is not subject to double jeopardy. The reason is that both are still under jeopardy until the criminal proceedings have run their course. See Lydon, 466 U.S. at 308 (recognizing the concept of "continuing jeopardy.") The Lydon decision does not require those defendants to be lumped together. The Petitioners have not otherwise provided a significant equal protection argument.

CONCLUSION

The questions presented by the Petitioners do not warrant review by this Court. The Utah Supreme Court's decision is sound. It is throughly reasoned and is based on the Utah trial and appellate court scheme as established by statute and as defined by other Utah Supreme Court cases. A decision by this Court would not affect any state other than Utah and the Utah courts have adequately addressed the issues. Neither the Double Jeopardy Clause, the Due Process Clause, nor the Equal Protection Clause require a state to automatically vacate a conviction if it provides appellate review through a trial de novo. The Petition for a Writ of Certiorari should be denied.

DATED this 2nd day of May, 2005.

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